



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Precision Logistics, Inc.

File: B-271429

Date: July 18, 1996

David K. Eary for the protester.

Benjamin G. Perkins, Esq., and Niketa L. Wharton, Esq., Defense Logistics Agency, for the agency.

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DIGEST

Protest is sustained where procuring agency failed to promptly forward protester's technical data package for alternate product to the office which conducts evaluations of alternate products for the flight critical aircraft part and failed to request expedited processing of the package, thereby depriving the protester of an opportunity to compete and resulting in a sole source award.

DECISION

Precision Logistics, Inc. protests the award of a contract to Wyvern Technologies, Inc. under request for proposals (RFP) No. SPO460-96-R-0509, issued by the Defense Logistics Agency, Defense Supply Center Richmond (DSCR), for electrical distribution boxes for the F-5 aircraft. Precision alleges DSCR unreasonably delayed the evaluation of its alternate product and thereby prevented Precision's alternate product from being evaluated in time for contract award.

We sustain the protest.

The RFP was issued on November 24, 1995, for a quantity of electrical distribution boxes described with a part number of Northrup Grumman Corporation.¹ The function of the distribution box is to rid the F-5 aircraft of heavy materials, including missiles, bombs, and electronic equipment not critical to control of the aircraft when the pilot needs to escape danger quickly. The RFP advised that the

¹The acquisition was initially issued under small purchase procedures in October 1994. That solicitation was canceled when the buyer determined that the procurement would exceed the small purchase threshold.

distribution box is a critical application item the failure of which could injure personnel or jeopardize a vital agency mission and only Wyvern's product was approved.

The RFP required offerors to specify whether they were offering the exact product listed in the item description or an alternate product. Alternate product offers were required to include all drawings, specifications, and data necessary to demonstrate the acceptability of the alternate product before award. The RFP also stated that if the agency could not determine that an alternate item was acceptable before the contract award date, the alternate offer would not be considered for this procurement. The RFP stated that award would be made to the offeror whose proposal represented the best value to the government, considering price and past performance.

By the December 26 closing date, DSCR received proposals from Wyvern, Precision, and Hill Aerospace Defense, the latter two offering alternate products. Precision's proposal included a technical data package for its alternate product and was significantly lower priced than Wyvern's. Hill did not submit a technical data package with its proposal; therefore, the buyer requested and, on January 17, received a technical data package from that firm. On January 18, the buyer forwarded both technical data packages to DSCR's technical operations division for review. That office reviewed the data packages and subsequently, on February 14, forwarded them to the Engineering Support Activity (ESA) at Kelly Air Force Base, Texas to evaluate and determine the technical acceptability of both alternate products. The ESA office was asked to complete its evaluation within 45 days.

Also on February 14, in response to the contracting officer's request, the buyer checked with the using activity and was informed that the distribution boxes were in backorder status. The contracting officer decided to proceed with award since the distribution box is a critical application item. Award was made on March 7 to Wyvern pursuant to 10 U.S.C. § 2304(c)(1) (1994), as the only known responsible source available to provide 13 items which the agency needed to fill existing backorders and to maintain an in-stock status. The award was for a unit price of \$27,491.81 and a total price of \$357,393.53.²

The ESA completed its review and approved Precision's alternate product on March 15. The approval notice was received by the contracting officer on March 19. DSCR has suspended performance of the contract pending resolution of the protest.

²Precision's unit price was \$9,640, and its total price was \$125,320.

Precision contends that it was denied an opportunity to compete for the award because the agency unreasonably failed to promptly process its December 26 technical data package for an alternate product. The protester notes that DSCR did not forward its technical data package to the ESA when its proposal was received. Instead, the buyer waited until Hill submitted a technical data package and, on January 18, sent the data package to DSCR's technical operations division. Almost 4 weeks later, the technical operations division forwarded both technical data packages to the ESA office for evaluation. These delays, the protester states, frustrated its right to compete and resulted in a sole source award to Wyvern.

In response, DSCR insists that it acted reasonably promptly in processing Precision's technical data package since, measured from December 26, 1995, only 34 working days elapsed between the receipt of the protester's proposal and submission of the technical data packages to the ESA office for evaluation. The agency explains that the solicitation closed during the Christmas holidays while the buyer for this item was on leave; however, upon her return on January 3, the buyer reviewed the two alternate offers, requested and received a technical data package from Hill on January 17, and submitted both offers to DSCR's technical operations office for evaluation. The agency reports that the buyer has no technical expertise to make a determination concerning the technical acceptability of an alternate product based on the technical data package so it is the agency's normal procedure to send technical data packages to its technical operations office for review. That office then determines whether the data packages are adequate, whether its technical personnel can review and evaluate the data packages or whether it is a matter for the ESA to review and evaluate. Here, because the required item is a critical application item, DSCR reports that its technical operations office determined that the technical data packages needed to be reviewed and evaluated by the ESA and forwarded both data packages for evaluation by the ESA, 19 working days after the technical operations office received the data packages from the buyer and 34 working days after receipt of Precision's proposal. Finally, DSCR argues that it was not required under 10 U.S.C. § 2319(c)(5) to delay award until Precision's alternate product was approved.

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304, with certain limited exceptions, requires contracting officers to "promote and provide for full and open competition in soliciting offers and awarding contracts." Federal Acquisition Regulation § 6.101(a). When an agency restricts a procurement to approved products, 10 U.S.C. § 2319(b) requires the agency to give offerors proposing alternate products a reasonable opportunity to demonstrate that their products can qualify. BWC Technologies, Inc., B-242734, May 16, 1991, 91-1 CPD ¶ 474. Implicit in this requirement is an obligation on the part of the agency to review alternate offers in a reasonably prompt manner. ABA Indus., Inc., B-250186, Jan. 13, 1993, 93-1 CPD ¶ 38. Where a procuring agency is not itself responsible for the evaluation and approval of an alternate product, it must promptly provide a

request for approval to the agency responsible for evaluation so as not to deprive an offeror of a reasonable opportunity to qualify its product and compete for award. Advanced Seal Technology, Inc., B-249855.2, Feb. 15, 1993, 93-1 CPD ¶ 137.

What constitutes a reasonable opportunity depends on the facts and circumstances of each particular case. For example, we have denied protests concerning agency delays in processing approval requests where the delay was longer than that involved in this case. See Tura Mach. Co., B-241426, Feb. 4, 1991, 91-1 CPD ¶ 114 (delay of approximately 3-1/2 months was not an unreasonable time to qualify alternate product). In this case, however, because contracting officials made no effort to assure prompt handling of Precision's technical data package, we think the agency did not meet its obligation to provide Precision with a reasonable opportunity to demonstrate its products could qualify. See BWC Technologies, Inc., supra.

First, we believe DSCR was not as diligent as it should have been in forwarding Precision's technical data package for review and evaluation. Although the buyer first reviewed the proposals on January 3 (after receiving them on December 26), the buyer did not immediately send Precision's technical data package to DSCR's technical operations office for review. Rather, the buyer held Precision's data package until January 18, an additional 2 weeks, in order to obtain a technical data package from Hill, which had failed to submit the required package with its proposal. The agency explains that the buyer held up Precision's data package because she erroneously believed it would take the ESA 60 to 90 days to respond to the request for evaluation of an alternate product and therefore did not believe that holding up Precision's package would prejudice Precision. In addition, the buyer believed that it would be "more efficient" for the agency to send both technical data packages for review and evaluation as opposed to submitting them separately.

While the buyer explains that she was attempting to promote competition by holding Precision's data package until it could be submitted with a data package from Hill, the result was that Precision was denied an opportunity to have its technical data package evaluated and approved in time for award. In our view, it simply made no sense to hold up the evaluation process on Precision's alternate product while waiting for a data package from Hill. The buyer apparently held up Precision's data package because it was more convenient to submit both packages at the same time. Given that at that point only one offeror was eligible for award and prompt processing of Precision's alternate offer was required for there to be competition on this procurement, we do not think the convenience of the buyer was a reasonable basis to delay the processing. The focus and thrust of CICA and 10 U.S.C. § 2319 is to enhance competition and preclude sole source awards as much as possible and to preclude necessary qualification requirements from restricting competition as much as possible. Under the circumstances here, although the buyer believed Precision would not be prejudiced because it would

take 60 to 90 days for the ESA to complete its evaluation, in fact, since the ESA approved Precision's alternate product within 1 week of the award, the 2-week delay prevented Precision from being eligible for award.

We are also concerned that the need for prompt consideration of Precision's data package was not communicated to the officials responsible for evaluation of alternate products. In this respect, although the contracting officer decided in February that award could not be delayed because there were seven backorders for the distribution boxes, there had been seven backorders when the solicitation was issued in November 1995. In spite of that situation--in which orders for this critical application item could not be met--no urgency was conveyed to the personnel responsible for evaluation of alternate products. Rather, although the form used by the buyer to forward Precision's technical data package permitted the requester to indicate that the matter was "URGENT," the form indicated the items were for "STOCK." In addition, although the form requesting support from the ESA permitted the requester to fill in an "ESA Response Time Required," and to state that the request was an emergency, the form used to request processing of Precision's data package allowed 45 days. Again, since there was no competition for this item, and since there was some urgency in the agency's need for this critical application item, we think the office which could see to prompt processing of the data package should have been informed of the urgency.

We also believe it would have been prudent for contracting officials to communicate with the office responsible for evaluation of alternate products prior to award to ascertain whether one or both of the alternate products had been approved at that time or whether approval was imminent. Had the buyer simply made a phone call to the ESA prior to the March 7 award, the buyer might have learned that Precision's alternate product would be approved shortly and under these circumstances the contracting officer might well have delayed the award for a few days in the interest of obtaining competition for the requirement. While the agency explains it is not its practice to contact the ESA regarding evaluation of alternate products, contracting officials have a duty to promote and provide for competition and to obtain the most advantageous contract for the government. In other words, contracting officials must act affirmatively to obtain and safeguard competition. See generally Compliance Corp.--Recon., B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435. They cannot take a docile approach and remain in a sole source situation when they could reasonably take steps to enhance competition. See TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700. Since the agency was faced with a sole source situation unless one or both of the alternate offers, both with substantially lower prices than Wyvern's, qualified, we think it was unreasonable for the agency not to inquire as to the status of the pending ESA evaluation before awarding the contract.

Finally, even where competition does not exist for a requirement, but will exist in the near future, the mandate of CICA for full and open competition requires agencies to purchase, in a noncompetitive environment, only what is necessary to satisfy needs that cannot await a competitive environment. See Ricoh Corp., 68 Comp. Gen. 531 (1989), 89-2 CPD ¶ 3. In this case, to the extent there was an urgent need for the distribution boxes when the agency decided to award the contract, there was no urgent need for all 13 of the units purchased. As the agency explains, on February 22, there were backorders for seven items and it purchased 13 in order to fill the backorders and provide stock at the rate of one item per quarter. Even had a noncompetitive award been justified, there was no justification for the purchase of 18 months worth of stock (six additional items which are used at the rate of one per quarter) on a sole source basis.

We sustain the protest and recommend that the agency terminate the contract awarded to Wyvern and, if necessary, conduct discussions with Wyvern and Precision and request best and final offers. The agency should then make award to the offeror whose proposal represents the best value to the government. In addition, Precision is entitled to recover the costs of filing and pursuing this protest. 4 C.F.R. § 21.8(d)(1) (1996). In accordance with 4 C.F.R. § 21.8(f)(1), Precision's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 90 days after receipt of this decision.

The protest is sustained.

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